PUBLIC WRONG AND PRIVATE ACTION.

WHEN does the violation of a criminal statute or ordinance make the wrongdoer civilly responsible? On this question the law is in some confusion.[1] Sometimes it is said that the wrongful act is "negligence *per se*"; sometimes that it is only "evidence of negligence"; sometimes again that it is "*prima facie* evidence of negligence."[2] With the bulk and variety of new legislation the question often comes up in one form or another, and it is desirable to recognize as exactly as possible the principles involved.

Much of the confusion in the cases has come from obscurity as to fundamental conceptions of the law of negligence. This is not surprising, for negligence is a modern head of the law, and decisions rendered before it attained its present development, when principles now well established were still imperfectly perceived, naturally make complications. To-day some things can to advantage be reëxamined and restated. And this ought to be done in as plain and straightforward a fashion as possible. Important as it is everywhere in our law that its distinctions follow simple and rational lines, this is particularly true of the law of negligence. In that topic refinement and complexity are least excusable. Owing to its recent development it is little complicated by outgrown rules; and its characteristic feature is the use of broad and general tests in which everything depends on the facts of the case. Within wide limits the jury is given the power to determine the propriety of conduct. The "ordinary prudent man" is a palpable fiction, designed to present to the jury's mind in concrete form the conception of an external as distinguished from a personal standard. What this imaginary person would have done really means what the jury thinks was the proper thing to do;[3] and so long as there is room for a fair difference of

[1] "The general question . . . whether an injury caused by the defendant while violating a statute is actionable *per se* is a troublesome one, open to much argument, and not yet settled by any generally accepted principle." Professor Wigmore, in 6 Ill. Law Rev. 350.

[2] For the authorities, see Jaggard on Torts, § 263.

[3] Arnold, Psychology applied to Legal Evidence, 168; Terry, Leading Principles of Anglo-American Law, § 204.

opinion on this point the jury has a free hand.[4] Here, as so often, the common law has adapted itself to the jury system, using that tribunal as an instrument for solving problems of everyday experience, and at the same time finding a check against arbitrary results in the court's supervisory power to keep the untrained body within the bounds of reason. And in formulating the principles which are to govern the jury's action, the scholar must vigilantly resist the temptation to spin his own web of theory and distinction, pleasing perhaps in ingenuity and symmetry, but too fine for everyday use. In the law of negligence no doctrine is useful or appropriate which cannot be plainly and simply stated, and which, when so stated, does not respond to the test of common sense.

This does not mean that the effort for clear thought and exact statement can be relaxed. Rather the contrary; for the very breadth of the subject has made it easy to hide confusion of thought behind ambiguous and question-begging phrases. "A loose vocabulary" as Professor Gray has said,[5] "is the fruitful mother of evils"; and in the present instance the slippery words "duty"[6] and "negligence"[7] are responsible for much of the progeny. Too often the mere statement of a conclusion that "the statute creates a duty to the plaintiff" is used as if it furnished some reasons in its own support.[8] At times it is coupled with the further assertion

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[4] See Thayer's Preliminary Treatise on Evidence, 226–229, 249–253.

This is one of the "parts of the administration of justice" which, as Professor Pound has said, "obstinately resist the attempt to reduce them completely to the domain of law. We think of some of these in our law as presenting cases peculiarly for the jury, and conceal the breakdown of our elaborate system of legal rules in these cases by making it appear that no more than questions of fact have been involved." "Justice according to Law," 13 Col. Law Rev. 699.

[5] 6 HARV. L. REV. 21. *Cf.* Professor Hohfeld's observations on "chameleon-hued words" in his able discussion of "Some Fundamental Legal Conceptions as applied in Judicial Reasoning," 23 Yale Law Journal, 29.

[6] See pp. 324–5, below.

[7] Terry, Leading Principles of Anglo-American Law, § 200; Salmond, Torts, 3 ed., § 5.

[8] *Cf.* Bullock *v.* Del. L. & W. R. R. Co., 60 N. J. L. 24, 26; Beale's Cases on Carriers, 185. "What could the company lawfully do under these circumstances? Anything which the company might do, to be lawful, must be an act which would cast no after duty on it to the passenger in respect to such act, nor subject the company to any after liability for damages by reason of having done it. Such after responsibility would incontestably prove that the company had overstepped the line which circumscribed its right to redress itself. Applying this test, can the act of the company, which constitutes the alleged wrong in this case, be justified?"

that "the plaintiff therefore has a remedy," as if this were something more than an identical proposition. In either form the question how the duty arose, and what it was that gave rise to it, is left in the same darkness as before. But this is manifestly the very question at issue.

In seeking the principles which determine the answer, the infinite variety of criminal statutes must be faced at the outset. The field includes the whole range of human activity, and legislative treatment must vary correspondingly.[9] Criminal statutes may be classified in all sorts of ways, according to the point of view from which the matter is approached. One basis of classification, however, naturally suggests itself when civil responsibility is under discussion, *i. e.*, the distinction between a statute which forbids an act, and one which requires affirmative action. This corresponds with a fundamental distinction in the law of torts, and as different principles are involved it will be well to deal separately with these two classes of statutes — those prohibiting action and those requiring action.[10]

PROHIBITIONS.

Instances of prohibitive legislation suggest themselves in abundance — health laws, traffic ordinances, speed limits, police regulations of all sorts. Suppose, for example, that an ordinance makes it a misdemeanor punishable by a fine to leave a horse unhitched on a highway. The defendant leaves his horse unhitched contrary to the ordinance and it runs away and injures the plaintiff. How does the fact that he has violated the ordinance affect his civil liability?

The first step in answering this question is to construe the ordinance. This, for our present purposes, means ascertaining not only its scope and meaning, but also the evil at which it was aimed — its object as well as its purport. In the case supposed both are plain. The language is free from ambiguity, and the aim is evi-

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[9] See the opinion of Wright, J., in Sherras *v.* De Rutzen, [1895] 1 Q. B. 918; Beale's Cases on Criminal Law, 2 ed., 379.

[10] The importance of this distinction has been shown by writers of authority: Wigmore, Summary of the Principles of Torts, §§ 167, 201; 1 Street, Foundations of Legal Liability, 172–175.

dently to lessen the danger to the public from straying or runaway horses.

It is common, at least in the case of statutes, to treat the question of construction as if it should go further than this and include an inquiry into the probable purpose of the statute with reference to private individuals — whether it was enacted for their benefit and was intended to give them a right of action. But this sort of speculation as to unexpressed legislative intent is a dangerous business, permissible only within narrow limits; and the tendency to overindulge it is responsible for much of the confusion in the law. Proper regard for the legislature includes the duty both to give full effect to its expressed purpose, and also to go no further. The legislature could, if it chose, have provided in terms that any one injured by a breach of the statute should have a remedy by civil action. Such a provision is familiar in criminal statutes. Its omission in this instance must therefore be treated as the deliberate choice of the legislature, and the court has no right to disregard it. On the other hand, the argument that the failure to give a private action bespeaks an intent that the statute shall have no effect on private rights has little weight. The legislature must be assumed to know the law, and if upon common-law principles such a statute would affect private rights, it must have been passed in anticipation of that result. The legislature is to be credited with meaning just what it said — that the conduct forbidden is an offense against the public, and that the offender shall suffer certain specified penalties for his offense. Whether his offense shall have any other legal consequence has not been passed on one way or the other as a question of legislative intent, but is left to be determined by the rules of law. The true attitude of the courts, therefore, is to ascertain the legislature's expressed intent, to refrain from conjecture as to its unexpressed intent (except in so far as that inquiry is necessary in order to give effect to what is expressed), and then to consider the resulting situation in the light of the common law. If his crime does not increase the wrongdoer's civil responsibilities on common-law principles, without calling in aid supposed legislative intent, then it should not affect them at all.

The impropriety of such speculation about an unexpressed legislative purpose to benefit individuals is more clearly apparent with an ordinance than a statute. An inferior body exercising delegated

powers must keep strictly within them; and the authority to create new civil rights and duties is not to be inferred from the mere power to enact traffic ordinances and provide penalties for breaking them.[11] If the effect of such an ordinance is to change the relations of individuals to one another, this must come about not through the intent of those who enacted the ordinance, but by the operation of common-law principles. It thus becomes a question of applying to the situation the principles of the law of negligence, in the light of which the ordinance was passed. By what tests would the defendant's liability have been determined before the date of the ordinance? and were those tests necessarily affected by its enactment?

Before the ordinance the plaintiff, injured by the runaway horse, must have based his action on negligence. Whether the defendant was negligent in leaving the horse unhitched would have been for the jury to say, unless this was so clear one way or the other that the court must deal with it as a "question of law" (so-called); *i. e.*, as a point on which fair minds could reach but one conclusion. In any situation less extreme the whole matter would have been within the jury's province. And the jury was bound in deciding it to use the test of the "ordinary prudent man." They could not acquit the defendant of negligence without saying that an ordinary prudent man would have left his horse unhitched under these circumstances; that with such a horse as this, and in such a place, the prudent man would have foreseen no danger to others — for the foresight of the prudent man in the defendant's position (in other words, the probability of danger from his standpoint) is the test of negligence. The jury was justified either in accepting or rejecting the theory that he was negligent, for the mere fact of submitting the issue of negligence to them means that a finding either way is warranted by the evidence. The reasonableness of the defendant's conduct was thus in the eye of the law an open question, depending on the circumstances and the inferences fairly to be drawn from them.

Suppose now the situation to be changed by the single circumstance of the ordinance, all other facts remaining the same. Can

[11] See Philadelphia & R. R. R. Co. *v.* Ervin, 89 Pa. 71, and note in Bohlen's Cases on Torts, p. 184; W. P. Malburn, Violation of Laws Limiting Speed as Negligence, 45 Am. L. Rev. 214.

the issue of negligence any longer be left to the jury? Not unless they would be justified in finding for either party; and what must a finding for the defendant on this issue mean? That an ordinary prudent man, knowing the ordinance — for upon familiar principles he can claim no benefit from his ignorance of the law — would have chosen to break it, "reasonably" believing that damage would not result from his action. It must then, upon this view, be deemed consistent with ordinary prudence for an individual to set his own opinion against the judgment authoritatively pronounced by constituted public authority, for the ordinance has prohibited leaving *all* horses unhitched, without exception, and has done this in order to prevent just such consequences as have occurred. It has thus declared the danger to be so serious and constant that a less sweeping prohibition would be inadequate. And when eminent courts, using familiar phraseology, state that the breach of the ordinance is not "negligence *per se*," but only "evidence of negligence," and leave the question of negligence as a fact to the jury, they are doing nothing less than informing that body that it may properly stamp with approval, as reasonable conduct, the action of one who has assumed to place his own foresight above that of the legislature [12] in respect of the very danger which it was legislating to prevent.[13] And the incongruity does not stop here. The plaintiff can in no event recover unless he shows not merely that the defendant was negligent, but also that his negligence proximately caused the injury; no negligence, however serious, will avail him if the causal connection is lacking and the injury would have come about none the less had the defendant used due care. Sending the case to the jury therefore means that there is evidence which would warrant a finding for the plaintiff on both points,— negligence and proximate cause. In this state of affairs

[12] Here and elsewhere I have used the word "legislature" indiscriminately whether a statute or an ordinance was in question; for in both cases it is the action of the constituted legislative authority regulating affairs within its proper province.

[13] In Ubelmann *v.* American Ice Co., 209 Pa. 398, the court describes the ordinance as "evidence of municipal expression of opinion, on a matter as to which the municipal authorities had acted, that the defendant was negligent"; and in Riegert *v.* Thackery, 212 Pa. 86, instructions to the jury are approved "that if they should find that a reasonably prudent person, under the circumstances, would not have erected a shed over the pavement or given warning of the danger from the erection of the building to those on the pavement, the defendant was not negligent, notwithstanding the ordinance." See Bohlen's Cases on Torts, 184, note.

an instruction that the breach of the ordinance is no more than "evidence of negligence" must mean that the jury is justified in pronouncing reasonable the conduct of a defendant when he not only assumed to be wiser than the legislature in his foresight, but when looked at also from the standpoint of hindsight he was wrong and the legislature was right in this particular case. Unless the court were prepared to go to this length it would be bound to say that if the breach of the ordinance did in fact contribute to the injury as a cause the defendant is liable as a matter of law;[14] but this is treating it as "negligence *per se*," to use the ordinary phraseology, and not merely "evidence of negligence."

The doctrine that a breach of the law is "evidence of negligence" is in truth perplexing and difficult of comprehension. It stands as a sort of compromise midway between two extremer views: (1) that a breach of law cannot be treated as prudent conduct; (2) that the ordinance was passed *alio intuitu* and does not touch civil relations.[15] Either of these views is intelligible; but to invite the jury to consider when and to what extent it is reasonable to break the law is a strange thing.[16] The prudent man, it seems, is a law-abiding person within limits, but he does not carry his respect for law to extremes. What tests or considerations

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[14] This may sometimes be the court's meaning when the phrase "evidence of negligence" is used; in other words, the permission to find for the defendant may mean that the jury would be warranted in concluding, not that the defendant was in the exercise of due care in breaking the law, but that his violation did not in fact contribute as a cause of the injury. If this is the court's meaning, the only criticism to be made is on the unfortunate choice of language to express it.

[15] For an argument in support of this view see Mr. Malburn's article on "Violation of Laws Limiting Speed as Negligence," 45 Am. L. Rev. 214. The admission of the ordinance is sometimes justified as bearing on the plaintiff's contributory negligence, since he may have reasonably relied on the defendant's not breaking it. See Connor *v.* Traction Co., 173 Pa. 602; Bohlen's Cases on Torts, 185, note. But if it may be reasonable for the defendant to break the ordinance (note 13, above), how is the plaintiff justified in assuming that he will not?

[16] The argument that a breach of law may be prudent conduct in fact is strongest in the case put by Knowlton, C. J., in Newcomb *v.* Boston Protective Department, 146 Mass. 596, 600, of a mistake of fact; the sale of milk, for example, reasonably supposed to be pure when the statute makes the seller's belief immaterial. The doctrine, however, that illegality is only "evidence of negligence" is not limited to such cases as this, but is commonly applied to the choice of conduct known to be unlawful, or to ignorance of the law; and whether it was an error of judgment or a mistake of fact which induced the breach of law, one whom it has injured without fault of his own may justly insist that the defendant acted at his peril.

are to guide the jury in determining when he may reasonably become lawless? The proposition that his breach of law is "*prima facie* evidence" of negligence helps but little, for the very statement implies that the *prima facie* impropriety may be rebutted. If so, what will rebut it? The doctrine in any form puts the court in an unsuitable attitude toward the legislature. And the fact that the offense is the violation not of a statute but of a municipal ordinance does not materially change the situation. Whether it be a statute or an ordinance, none the less the state has spoken through a legislative body having authority to deal with the situation; a standard of conduct has been fixed in order to prevent a public evil; and the liberty of the individual has been curtailed for the protection of others. When such a prohibition has been violated and the very evil aimed at by the law has been brought about, approval of the wrongdoer's conduct by the court is not consistent with proper respect for another branch of the government. A doctrine which sanctions such approval would hardly continue unless as a practical matter juries could be counted on to nullify it; and it would never have grown up but for the confusion of language already referred to. Its parentage is not hard to trace; it can be affiliated on "negligence" and "duty." The proposition that a municipal ordinance of this sort "does not create duties to individuals" has a plausible sound, and leads easily to the conclusion that breach of such an ordinance cannot be more than "evidence of negligence."[17] It is worth while, therefore, to state the situation in terms of "duty." What precisely was the "duty of care" which existed before the ordinance was passed?

(1) In the first place, it was a "duty" without a corresponding right in anybody.[18] When a plaintiff can invoke no legal remedy of any sort, either redressive or preventive, against conduct to which he objects, it cannot be said that a legal right of his has been infringed. Evidently, then, there is no "duty" of care in the same sense that there is a "duty" not to break a contract or not to trespass on another's land. The only protection given by the law to the plaintiff's interest is a right of action if he is harmed by the defendant's negligence. The "duty" means only

[17] See, *e. g.*, Phil. & R. R. R. Co. *v.* Ervin, 89 Pa. 71; Bohlen's Cases on Torts, 183.

[18] Terry, Leading Principles of Anglo-American Law, §§ 113–115, 121–125.

that the defendant is negligent at his peril,[19] just as he keeps at his peril savage beasts, or (where Fletcher *v.* Rylands is law) some things stored on his land. It would be consistent to extend the established usage and say that there is a "duty" not to keep a dog which has enjoyed his first bite.

(2) The "duty" attaches only to positive conduct;[20] excepting in a few special relations a man who has made no contract is liable for his acts only, and not for his omissions, no matter how wicked or how harmful these may be. And not only is his liability limited to active conduct, but to *dangerous* conduct, *i. e.*, conduct which threatens harm to others unless care is used. The "duty of care" attaches only to such conduct; if a prudent man would foresee no injurious consequences from his acts, whether careful or not, then there is no obligation to use care. Danger, reasonably to be foreseen at the time of acting, is the established test of negligence. The proposition, then, that the defendant is under a "duty of care" to certain persons in a certain situation means that as to them he acts at peril if he does dangerous things carelessly.

How does the ordinance change this situation? Before its passage the common-law liability was for negligent conduct; "negligent" meant "dangerous"; the test of danger was the foresight of the prudent man; the jury, within the territory where opinions could reasonably differ, was to say what he would have foreseen; outside this territory the question was for the court. The ordinance narrows the last question.[21] The court can no longer

[19] "Duty" is, however, a natural word to use for this purpose: (1) because the test is one of rightness, negligence being conduct that is in some sense morally as well as legally objectionable; (2) because of the characteristic feature of the common law requiring a *relation* between the parties, so that negligence toward one person is not necessarily negligence toward another. Both these conceptions are aptly enough expressed by the word "duty."

[20] This proposition has been somewhat obscured by the much-quoted observation of a distinguished judge (Willes, J., in Grill *v.* General Iron Screw Collier Co., L. R. 1 C. P. 600, Smith's Cases on Torts, 2 ed., 204), that "confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use." When this remark, made with reference to a contract, is wrenched from its context and made to do duty as an exposition of negligence in the law of torts, the subject is not clarified.

[21] This is well brought out by Hamersley, J., in Monroe *v.* Hartford St. Ry. Co., 76 Conn. 201, 2 Wigmore's Cases on Torts, 185; and by Mitchell, J., in Osborne *v.* McMasters, 40 Minn. 103, Smith's Cases on Torts, 2 ed., 95.

submit the question of danger to the jury, because there is no longer room for a reasonable difference of opinion.[22] The ordinance has foreclosed the question whether an unhitched horse is a dangerous thing, not because it was passed with any specific reference to civil suits, but because the state, through its legislative organs, has condemned the act of leaving him unhitched by reason of its tendency to bring about just such harm as this. This can only mean that the act is labelled "dangerous." It is an unjust reproach to our old friend the ordinary prudent man to suppose that he would do such a thing in the teeth of the ordinance. It would mean changing his nature, and giving over the very traits which brought him into existence. And when by so doing he caused the very harm which the ordinance aimed to prevent, he would be the first to admit that he should break the ordinance at his peril. The reasons which have led the law to declare that he is negligent at his peril, or keeps a savage animal (or in England a reservoir) at his peril, apply more strongly here.[23]

An analogy may be found in the law concerning public nuisances. Such an analogy should be scrutinized with care, for "nuisance" is a good word to beg a question with. It is so comprehensive a term, and its content is so heterogeneous, that it scarcely does more than state a legal conclusion that for one or another of widely varying reasons the thing stigmatized as a nuisance violates the rights of others.[24] But for our present purposes a wrongful obstruction of the highway makes a fair illustration. Such an obstruction is a legal wrong because it prevents the public from using the highway safely and conveniently. The state may therefore proceed against the offender. An individual, however, has no right of action until he suffers special and peculiar damage; if

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[22] "In any case the standard is usually defined as that degree of care that men of ordinary care and prudence usually exercise. But when the standard is fixed by law or ordinance, how can one be heard to say that he exercised care in exceeding, or in refraining to comply with, the standard fixed?" Frick, J., in Smith *v.* Mine & Smelter Supply Co., 32 Utah 21, 30.

[23] So far at least as concerns civil suits there is no help in "the old fashioned distinction between *mala prohibita* and *mala in se*." Such a discrimination is as unworkable as it is unscientific, and as Sir Frederick Pollock says (Torts, 8 ed., p. 27), it "is long since exploded."

[24] See Terry, Leading Principles of Anglo-American Law, § 434; 2 Cooley on Torts, 3 ed., 1176.

he suffers such damage, he has his private action.[25] Thus the defendant, although his act is wrongful as to the public, stands as to individuals only in the position of acting at his peril. This is the same result to which the foregoing argument leads in the case of the present ordinance, and the situation is in all its essentials the same.[26] The legislature's power to extend and make definite the law of nuisance is beyond question; and the present ordinance amounts to exactly this — that a horse in the city streets, unhitched and unattended, *is* a public nuisance. Thereafter the presence of the unhitched animal is a legal wrong for the same reasons, and in the same way, as any other unlawful obstruction.[27]

The same analysis fits a multitude of other cases. As society develops, new dangers to the public welfare are constantly perceived, and new prohibitions are enacted by the legislature. They may be regulations of highway traffic, — the position of vehicles on the highway,[28] the speed at which they may run,[29] the conduct of railways at crossings;[30] or building laws passed to lessen fire risks;[31] or restrictions on the use of dangerous articles, such as the carrying of firearms by children,[32] or the sale of poisons unlabeled,[33] or handling explosives without specified precautions.[34]

[25] The requirement that the damage suffered by the plaintiff must have been "special and peculiar" to entitle him to recover has no doubt at times been somewhat rigidly insisted upon; but whether or not it has been too narrowly applied, the principle is none the less clear. See Stetson *v.* Faxon, 19 Pick. 147; Aldrich *v.* Wetmore, 52 Minn. 164.

[26] This is well brought out by Knowlton, C. J., in his able and important opinion in Bourne *v.* Whitman, 209 Mass. 155, 167.

[27] So in Siemers *v.* Eisen, 54 Cal. 418, the court said: "The practice of leaving animals, attached to vehicles, unfastened upon our public streets, and thus placing in jeopardy the lives of men, women, and children, should not be tolerated. It is, in fact, condemned by the law, and when damages result therefrom, the owner of such animal should be held to a strict legal accountability." To the same effect is Bott *v.* Pratt, 33 Minn. 323. For the contrary view, that the violation is only "evidence of negligence," see Knupfle *v.* Knickerbocker Ice Co., 84 N. Y. 488, Smith's Cases on Torts, 2 ed., p. 94; Fluker *v.* Ziegele Brewing Co., 201 N. Y. 40.

[28] Newcomb *v.* Boston Protective Dept., 146 Mass. 596, Smith's Cases on Torts, 2 ed., 122.

[29] U. S. Brewing Co. *v.* Stoltenberg, 211 Ill. 531, 1 Wigmore's Cases on Torts, 1058.

[30] Holman *v.* Chic. R. Co., 62 Mo. 562, Smith's Cases on Torts, 2 ed., 107.

[31] Aldrich *v.* Howard, 7 R. I. 199, Smith's Cases on Torts, 2 ed., 90. Observe the careful qualification of this case in Grant *v.* Slater Mill Co., 14 R. I. 380.

[32] Horton *v.* Wylie, 115 Wis. 505.

[33] Osborne *v.* McMasters, 40 Minn. 103, Smith's Cases on Torts, 2 ed., 95.

[34] Brannock *v.* Elmore, 114 Mo. 55; Smith *v.* Mine & Smelter Supply Co., 32 Utah 21.

Whatever form the prohibition may take, and the varieties are infinite, a danger has been deemed by the legislature so great as to justify making its creation or continuance a public wrong. A new statutory "nuisance" has thus been created in every sense in which that word has legal significance; and the proposition that he who violates the statute or ordinance does so at his peril is only an application of the principle that an action lies in favor of one who has suffered a private injury from a public nuisance.[35]

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[35] It is worth noticing that in continental systems the wrongdoer's liability for damages occasioned by his breach of the criminal law is treated as a matter of course, and the damages are awarded in the criminal proceeding. Code Instr. Crim., Art. 3; Germ. Penal Code, §§ 230, 231. The theory is stated thus by Bosc, Essai sur les Éléments constitutifs du Délit, 66, 72:

Acte prévu et puni par la loi pénale. — La victime n'a rien à prouver contre leur auteur au point de vue du caractère illicite. Ce caractère découle du fait que l'acte est interdit par la loi pénale. Il est évident que pas plus au point de vue civil qu'au point de vue pénal, on n'a le droit de faire ce que la loi interdit, et le particulier lésé par une crime est légitimement fondé à obtenir réparation du tort qu'il a subi, comme la société du trouble dont elle souffre.

Inobservation d'un règlement. — Un règlement légalement promulgué constitue une loi pour ceux qu'il vise et s'impose d'une façon absolue à leur observation. S'ils y contreviennent, ils peuvent être punis de peines plus ou moins fortes. Aussi dirons-nous que, si de cette inobservation résulte un préjudice pour quelqu'un, ce préjudice devra être réparé par celui qui a contrevenu au règlement. Ici encore, l'acte est illicite en soi, parce qu'il a été accompli en violation d'une sorte de loi, et il suffit à la victime d'établir le caractère obligatoire du règlement, et de prouver que, s'il eût été observé, le préjudice eût été évité. Ce sera par exemple, une Compagnie de chemin de fer qui aura négligé de fermer ses portières, ou un charretier qui n'aura pas tenu la gauche de la route, etc.

La seule différence qui sépare cette hypothèse de la précédente, c'est qu'ici au lieu d'être en présence d'une loi obligatoire pour tous, nous ne sommes en présence que d'un règlement obligatoire pour quelques-uns, et qui ne peut rendre illicite par lui-même l'acte d'un individu auquel il ne s'applique pas. La Compagnie de chemin de fer, par exemple, obligée de fermer ses portières, est responsable par cela seul de l'accident causé par leur nonfermeture. Si, au contraire, un accident arrivait dans une voiture de place, par suite de portières mal fermées, la victime (la chose en fait ira de soi, nous parlons ici théoriquement) aurait à prouver l'imprudence ou la négligence du cocher.

This passage, as well as other illustrations used by the author, show that the "règlement" to which he refers is a regulation having the force of law and not a mere rule of the company. The regulations, indeed, of a government railway, if penalties were provided for their violation, would not stand like the rules of a private corporation. Whether the breach of such rules is evidence of negligence raises a different question, as to which compare Hoffman *v.* Cedar Rapids Co., 139 N. W. 165 (Sup. Ct. Iowa) with Stevens *v.* Boston Elevated Railway Co., 184 Mass. 476.

Affirmative Requirements.

So much for statutes forbidding objectionable conduct and punishing one who does the forbidden thing. But suppose the statute calls for action, and punishes a failure to do the thing required. Here different considerations come in. The reasons already given will not help one who sues for a private injury, for they were based on the defendant's dangerous conduct. A plaintiff harmed by such conduct had rights at common law, and the effect of the statute or ordinance in changing the test of liability was only incidental to the operation of common-law principles. But where it is a mere omission there is no basis for liability at the common law. If there is a civil action it must arise in some other way.

To take a familiar illustration, suppose a statute[36] requires abutters to remove snow and ice from their sidewalks. The violation of such a law, although a public wrong, involves no wrongful positive conduct in the abutter. He has merely omitted to take from the path of travel what nature brought there. If a traveler injured by the obstruction seeks a remedy against the abutter, he will make no headway by the aid of common-law principles. To prevail he must show an actual intent in the statute that a person injured by its breach shall recover his damages from the abutter; in other words, he must read such a clause into the statute by implication. Is such an implication warranted?

One or two discriminations must be observed at the outset.

(1) It may be a difficult question in any given case whether the statute is really a prohibition or an affirmative requirement.[37]

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[36] This snow and ice question (as to which see Bohlen's Cases on Torts, 179, note 5; 12 Col. Law Rev. 749) is usually raised by a municipal ordinance and not a statute, but this is not always so; see, *e. g.*, Taylor *v.* Railroad Co., 45 Mich. 74. And the present point is best brought out by supposing a statute.

[37] Dawson & Co. *v.* Bingley Urban District Council, [1911] 2 K. B. 149, is an interesting case in which this question was much discussed by the Court of Appeal. The defendant was a municipal board charged with the duty of furnishing water for fire protection, and among other things providing proper fire plugs and putting up signs in the streets to show their situation. They put up the sign in the wrong place, and this delayed the fire brigade in hunting for the plug while the plaintiff's building was burning. The court held the defendant liable for the plaintiff's additional damage during this delay, basing its decision on the ground that the defendant had been guilty of a misfeasance. This was a curious situation. The defendant no doubt did something negligently; and the court treated it as in Metallic Casting Co. *v.* Fitchburg

This difficulty in discriminating a misfeasance from a nonfeasance often arises in the law in different forms; and in the present case it will not be solved by the mere words of the statute. It is preëminently the sort of matter in which the court must not stick in the bark; the problems raised by mandatory injunctions show how unlimited is the power of mere words to express in negative form what is affirmative in substance. The nature of the first ordinance under consideration would not have been changed if the legislature had phrased it as an affirmative requirement that all horses be hitched; nor the second, if it had prohibited the act of keeping the snow on the sidewalk.[38] In every case the test must be the true nature of the situation in substance and reason. If the defendant's breach of law amounts, on a true analysis, to injurious active conduct, the plaintiff may invoke the principles above set forth in support of his private action; otherwise he cannot. The difficulties of this analysis are responsible for some of the confusion and conflict of decision over the statutes requiring a railroad to fence its right of way.[39]

(2) An important class of statutes regulates the conduct of persons who were already under affirmative common-law duties. If a shipmaster be required to keep medicines on board for his passengers, or an employer to maintain safety appliances, the legislature is prescribing details concerning protection which in some form the carrier and employer were already bound to give — making definite and specific that which before was governed by the general test of reasonableness. There is no difficulty about giving the

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R. R., 109 Mass. 277, where the defendant was held liable for negligently cutting the hose which was playing on the plaintiff's burning factory. But in the Dawson case the misplaced sign was a part of the defendant's system; and it is hard to distinguish this from other negligent conduct depriving the plaintiff of a proper supply of water, for which the defendant would not be liable under Atkinson *v.* Newcastle & Gateshead Waterworks Co., 2 Ex. Div. 441. As to misfeasance and nonfeasance in these cases see also Cowley *v.* Newmarket Local Board, [1892] A. C. 345; Glossop *v.* Heston Local Board, 12 Ch. D. 102; Mayor of Shoreditch *v.* Bull, 90 L. T. N. S. 210.

[38] *Cf.* Mass. St. 1909, c. 534, § 22, punishing one "who knowingly goes away without stopping and making himself known after causing any injury." Commonwealth *v.* Horsfall, 213 Mass. 232. "The distinction between a nonfeasance and a misfeasance is often one more of form than of substance." Commonwealth *v.* Proprietors of New Bedford Bridge, 2 Gray, 339, 346.

[39] Hayes *v.* Mich. Cent. R. R., 111 U. S. 228; Menut *v.* Boston & Maine R. R., 207 Mass. 12, and cases cited. And see note 62, below.

injured person the benefit of this legislation without any express provision to that effect in the act. Here, as in the case of the unhitched horse, the necessary effect of the legislative action properly interpreted is to replace the old by new and exacter standards.[40]

In cases which fall under neither of these heads it is a dubious and a dangerous thing for the courts to speculate as to unexpressed legislative intent and create private remedies by implication. So far as this matter is concerned, the same considerations are involved as in the case of prohibitive statutes.[41] Of course the statute must be fairly treated; and if a private action is necessary to carry it into effect, the legislature must be credited with intent to provide such a remedy. No doubt, too, the purpose of some criminal statutes is to provide an emphatic sanction for the protection of private rights — as in acts making trespass to land a criminal offense. In such cases, "although the proceeding is criminal in form it is really only a summary mode of enforcing a civil right."[42] But in the ordinary case the court cannot overlook the fact that the legislature *chose to omit* any provision for a private remedy. This omission of a perfectly familiar provision cannot be treated as accidental, and adding such a clause by implication means putting a different burden on the defendant from that which the legislature saw fit to impose. Important as it is to give full effect to what the legislature has said, reading the statute in the light of common-law principles, it is not less important to keep within the bounds fixed by the legislature, and not lightly enter upon the field of extension by implication, even though it be reasonable implication.

Looseness on this point has been bred by Lord Campbell's much-cited judgment in Couch *v.* Steel.[43] The statute involved in that case, requiring medicines to be kept on board ship, plainly dealt with a duty already owed by the master to his passengers and crew, and the only doubt was whether a penalty prescribed by the act was intended to be the exclusive remedy for its breach. This penalty was not limited to the injured person, but was given to a

[40] See pp. 325–6, above.

[41] See p. 320, above.

[42] Wright, J., in Sherras *v.* De Rutzen, [1895] 1 Q. B. 918, 922. But in a case of this sort the plaintiff has no need of calling the statute in aid of his civil action.

[43] 3 E. & B. 402.

common informer, and there seems nothing to criticize in the decision that a seaman injured by the master's violation of the act should have his private action. But in reaching this result Lord Campbell quoted without qualification the statement of Comyns's Digest that "in every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the said law," as if it meant that in all cases where one whom a criminal statute was intended to benefit is harmed by its breach, whether omission or commission, and whether the statute provides a remedy or not, he has a right of action; and this has often been repeated in the same broad way. Such a notion is far from the meaning of the passage quoted by Lord Campbell, as is shown by the context and the judgment of Lord Holt from which it was taken;[44] and the breadth of Lord Campbell's language was limited with characteristic accuracy by Lord Cairns in Atkinson *v.* Newcastle & Gateshead Waterworks Co., 2 Ex. Div. 441,[45] a suit by a private individual for damages caused by a waterworks company's failure to furnish the service required by its charter. Such a suit raises very different questions from those involved in Couch *v.* Steel; but a literal application of Lord Campbell's language would cover both alike. Once it be made to appear, in the case of a statute like this or like that requiring the abutter to remove snow and ice from the sidewalk, that there are reasonable grounds on which the legislature *may*

[44] The section of Comyns's Digest (F, "Action upon Statute by the Party grieved") begins with a series of illustrations in each of which the statute expressly provided a penalty, considers whether in these cases the penalty was limited to the party aggrieved and whether it excluded other remedies, and then continues with the passage quoted by Lord Campbell in Couch *v.* Steel, citing for this Lord Holt, 6 Mod. 27. This was Lord Holt's judgment in full: "If money be devised out of lands, sure the devisee may have *debt* against the owner of the land for the money, upon the statute of 32 Hen. VIII, c. 1, of Wills; for wherever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity; and the action must be against the terre-tenant." It is a far cry from the subject matter of this opinion, and from Lord Holt's defense of his prerogatives against the encroachments of chancery, to the proposition that private rights are created by criminal statutes.

[45] See also Johnston *v.* Consumers' Gas Co., [1898] A. C. 447; Beven, Negligence in Law, 3 ed., 305 *et seq.*

have preferred to leave the defendant under obligations to the public only, the omission of any express provision for a private remedy is a sufficient ground for denying its existence.

The application of these general principles raises many interesting questions which cannot be discussed within the limits of a single article. One or two of them, however, may be glanced at.

1. What are the rights of a trespasser or a bare licensee injured by the defendant's unlawful act — a trespassing child, for example, hurt by explosives illegally kept,[46] or a licensee who falls into a shaft illegally left unguarded? [47]

The first step in answering such a question, after ascertaining the meaning of the statute and the evil at which it was aimed, is to determine the rules of law which would govern if there were no criminal statute in the case. It is this which largely accounts for the delicacy and variety of the questions raised by modern criminal legislation in its effect on civil rights. That effect cannot be known until the common law governing the situation is first determined; for however artificial may be the assumption that the legislature understood the law, it is an assumption from which the court cannot depart. It may be hard, even for the court, to determine the common-law rule; [48] and that rule may not be easy to justify in rea-

[46] Bennett *v.* Odell Mfg. Co., 76 N. H. 180.

[47] Hamilton *v.* Minn. Desk Co., 78 Minn. 3.

[48] So in Ryall *v.* Kidwell, [1913] 3 K. B. 123, the difficulty of the question comes entirely from the common-law problems which are involved. The Housing Act provided that in every contract for letting there should be implied a condition that the house was in all respects fit for habitation, and that this should take effect as if there were an undertaking of the lessor that the house should be so kept during the holding. A divisional court (Ridley and Avory, JJ.) held that this affected only the contract between the landlord and tenant and gave no rights to a member of the tenant's family, treating this as a necessary consequence of Cavalier *v.* Pope, [1906] A. C. 428. The correctness of this conclusion must depend, it would seem, on the breadth of the doctrine for which Cavalier *v.* Pope stands, and how far it must be qualified by the considerations discussed in Miles *v.* Janvrin, 196 Mass. 431; 200 Mass. 514; obviously a question of much nicety. *Cf.* Tvedt *v.* Wheeler, 70 Minn. 161.

Again, in Baxter *v.* Coughlin, 70 Minn. 1, the court dealt — perhaps rather summarily — with delicate questions in the law of corporations and agency in deciding that bank directors who did not personally receive a deposit were rendered liable to a depositor by reason of a statute punishing the receipt of deposits if a bank was known to be unsafe or insolvent.

son or to reconcile with legal principle;[49] but however that may be it is theoretically one of the data which the legislature had before it when it acted.

In the case of trespassers and licensees several difficult questions arise. If the defendant did the harm by active conduct after the plaintiff's presence was, or should have been, known, what duty was owed him? Some courts would hold the defendant up to the external standard of the ordinary prudent man, even in favor of a trespasser;[50] others would refuse to do this even (under some circumstances at least) when the plaintiff was a licensee,[51] and would hold him responsible only if his conduct was wanton and reckless — in other words, would impose a subjective test only and require a *mens rea*. If it were not a case of active force applied after the plaintiff's presence was known, but a dangerous condition of the premises — and this would be the ordinary situation in the sort of case now under discussion — there would be no duty of care, and no liability without a "trap" of some sort. But the tests to determine whether a "trap" exists will not necessarily be the same for trespassers and licensees, and difficult questions may be raised by changes in the condition of the premises after the license was given. These questions must be solved before the effect of the statute can be ascertained; and it must then be determined what is added by the statute.

Whenever due care is the issue, the breach of the statute supplies the legal equivalent of negligence. The defendant is in no position to meet the test of the prudent man. Here is no question of *mens rea;* the defendant may have been innocently heedless, or congenitally incapable of the care required; but regardless of moral considerations he must at his peril come up to the legal standard and do what the jury deems the proper

[49] The doctrine, for instance, which denies a remedy to any person except the buyer who is injured by defects in a chattel due to the seller's negligence is not easy to defend on principle; see Judge Smith's comments and the authorities cited by him in his Cases on Torts, 2 ed., 175; and this complicates the questions raised when the sale was in contravention of a statute. It would seem, however, that in such a case the courts should accept the statute as a legislative declaration that this is a dangerous article, and so bring the case within the exceptions which would permit a recovery at common law. See Stowell *v.* Standard Oil Co., 139 Mich. 18; Gately *v.* Taylor, 211 Mass. 60; 27 HARV. L. REV. 98.

[50] Herrick *v.* Wixom, 121 Mich. 384, Smith's Cases on Torts, 2 ed., 375; Myers *v.* Boston & Maine, 72 N. H. 175, Smith's Cases on Torts, 2 ed., 385.

[51] O'Brien *v.* Union Freight Railroad, 209 Mass. 449.

thing. In such a case, therefore, the result will be that he who breaks the statute does so at his peril.[52] But it is a very different thing to find in the violation of the statute the equivalent of a *mens rea*. In the sort of statute or ordinance commonly involved in these cases no *mens rea* is required even for criminal liability; the mere fact that it has been broken tells nothing, therefore, of the defendant's state of mind. It is not clear, indeed, what the breach of the statute, in and of itself, adds to the case except to relieve the plaintiff from proving negligence, unless objectionable fictions are to be invoked in his aid; and Sir Frederick Pollock's statement that "The commission of an act specifically forbidden by law . . . is generally equivalent to an act done with intent to cause wrongful injury" [53] seems too broad. It may be true that in so far as the defendant's knowledge of danger enters into the definition of a "trap," a defendant who has knowingly permitted the violation of the statute should be affected also with knowledge of the danger; but in general it would seem that if before the statute the defendant, although negligent, would not have been liable without proof of some wrongful state of mind, proof of such a state of mind is just as necessary after the statute, unless it intended to provide a civil as well as a criminal remedy for its violation. In this case, therefore, even though the breach of statute was positive conduct prohibited by law, the result is the same as in the case of an omission to comply with an affirmative requirement; there can be no private action unless the legislature actually intended to give it; and there are the same strong reasons against stretching its language by implying provisions which might have been inserted but were not.[54]

2. Is the defendant liable when the statute aimed to prevent one sort of harm, and his violation caused harm of a different sort?

Such a situation is not common. Where the harm is not that against which the statute was directed, there is generally no causal connection between the law breaking and the injury, and the plaintiff's action fails for this reason. It would equally fail if the statute

[52] So when it is a defect in the condition of the premises, and the plaintiff is a business guest, so that a duty of care is owed him, he should clearly be allowed to recover. Barfoot *v.* White Star Line, 170 Mich. 349. The difficulties raised by such cases as Parker *v.* Barnard, 135 Mass. 116, Racine *v.* Morris, 201 N. Y. 240, and Kelly *v.* Henry Muhs Co., 71 N. J. L. 358, are really in determining the plaintiff's true status at common law.

[53] Torts, 8 ed., 26.

[54] See 27 HARV. L. REV. 281.

expressly gave a private action to any person harmed by its violation.[55] The driver of an automobile may at the moment of a collision be committing a crime by profanely swearing, or carrying concealed weapons, or traveling without his license or without properly exposing the number of his car; but none of these things would render him liable to a wayfarer whom he injured without negligence. Criminal conduct which had no effect in causing the injury can no more be a ground of liability than non-causative negligence.[56] In either case the wrongdoing is without legal significance as between these parties.[57] But although the connection of cause and effect is rare where the statute contemplates one sort of harm and another results, it is none the less possible, and the situation raises questions of some difficulty.

Gorris *v.* Scott [58] makes a good illustration. A statute required carriers of animals to furnish certain protection during the transit, including separate pens and footholds. This was a sanitary regulation, aimed only at preventing disease, and not meant to give

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[55] Holman *v.* Chicago R. R. Co., 62 Mo. 562, Smith's Cases on Torts, 2 ed., 107; McKune *v.* Santa Clara Co., 110 Cal. 480.

[56] Bohlen's Cases on Torts, 176, note. See also on this point Judge Smith's able and exhaustive discussion of "Legal Cause in Actions of Tort" in 25 HARV. L. REV. 103, 223, 303; Heiting *v.* Chic., R. I. & Pac. Ry. Co., 252 Ill. 466.

[57] This question of the causal connection between the breach and the damage raises difficulties in cases arising under the child-labor statutes; compare Beauchamp & Sturges *v.* Burn Mfg. Co., 250 Ill. 303, with Berdos *v.* Tremont & Suffolk Mills, 209 Mass. 489, and Moran *v.* Dickinson, 204 Mass. 559. The same problems have troubled courts in other countries. In a French case a printer's apprentice, employed in the evening in violation of a law forbidding minors to be kept at work after seven, went into the pressroom to play and was killed. The civil court of Evreux refused to hold the master responsible, saying, "Si Aubert . . . a exigé de son apprenti, en dehors des conventions, un surcroît de travail, cette exigence ne pourrait entraîner la responsabilité du patron qu'autant qu'il y aurait entre elle et l'accident une relation directe, c'est-a-dire qu'autant que l'accident pourrait être attribué au surmenage de l'apprenti, que Jousset ne le prétend nullement" . . . But the Court of Cassation reversed the judgment and allowed the boy's parents to recover on the following grounds: "Le sieur Aubert a commis une faute qui a eu pour conséquence l'indue prolongation du séjour du jeune Jousset dans l'imprimerie, prolongation sans laquelle il n'eût pas été matériellement possible à celui-ci de commettre l'acte d'indiscipline constaté a sa charge" . . . "Il résulte de là que dans une mesure à determiner, le sieur Aubert a contribué par sa faute à occasionner l'accident arrivé à son apprenti." Cass. 7 Août, 1895; Sirey, 1896, 1, 127. For comments on "cause indirecte" in the French law, see Gérard, Les "Torts" ou Délits Civils en Droit Anglais, 307–308.

[58] L. R. 9 Ex. 125; Smith's Cases on Torts, 2 ed., 103.

protection against perils of the sea. But the lack of the partitions and footholds did in fact result in the loss of the plaintiff's sheep, for a storm washed them overboard when the partitions and footholds would have saved them. Here the defendant's breach of law may fairly be regarded as wrongful positive conduct in improperly herding the animals together and carrying them without the required safeguards; and the continuous act of so transporting them without the protections which would have saved them was a proximate cause of their loss. A plausible argument may be made for the owner on the theory that he has suffered from the carrier's breach of a duty owed to him; he could clearly have recovered if the carrier's failure to separate the sheep had caused them to become infected with disease, and this on grounds already set forth, without indulging in any implications as to the intention of the statute to give a private remedy.[59] But the soundness of this argument is questionable. The carrier took all the care of the sheep which prudence required except in respect to the spread of disease. So far as perils of the sea were concerned, a prudent man would have acted as he did. On this point the legislature had no new light. It made stricter and more specific the precautions to be taken against disease, and in other respects left the parties to the common law. If the lack of partitions had injured a third person by causing the sheep to be dashed against him, the breach of statute would have given him no rights against the carrier. The characteristic common-law requirement of a relation between the parties in respect to the matter in hand, its insistence that the defendant's duties to others are no concern of the plaintiff,[60] would have disposed of the injured person's claim. The defendant's breach of duty to the state or to the owner of the sheep was nothing to this plaintiff. It is a closer case where, as in Gorris *v.* Scott, the harm has fallen upon the person to whom the "duty" was owed; but the defendant may invoke similar considerations. A new "nuisance" has indeed been forbidden by the statute, and the defendant has committed it; but his conduct is a nuisance only

[59] *Cf.* Evans *v.* Chic. & N. W. Ry. Co., 109 Minn. 64, holding a carrier which had brought into the state a diseased horse without complying with the inspection laws liable to a purchaser from the consignee.

[60] On this point see the interesting opinion of Peaslee, J., in Garland *v.* Boston & Maine R. R., 76 N. H. 556.

in one of its aspects and in respect to one class of consequences. Just as a savage animal is kept at peril as to all consequences of his ferocity, but in other respects, like the frightening of horses by his smell, the owner is liable only for negligence,[61] so here he should be held to act at peril only as to the kind of harm which the legislature sought to prevent.[62] Any other conclusion would mean giving the statute an operation beyond the interests it was designed to protect. The decision in Gorris *v.* Scott for the defendant seems, therefore, sound; and the same result might have been reached by statutory construction, even if the act had contained the familiar clause giving the owner in terms a right of action for injuries caused by its breach.

3. Should a breach of the criminal law have the same effect in barring a plaintiff's right of action that it would have in making him liable for injuries caused to others?

A distinguished judge has suggested a different treatment of the two situations. In Newcomb *v.* Boston Protective Department, 146 Mass. 596, 603, Chief Justice Knowlton said:

"There is nothing in the language of Hanlon *v.* South Boston Railroad" [a decision that the defendant's violation of an ordinance was "evidence of negligence" only, in which the court said, "It is not true that if an unlawful rate of speed contributed to the injury that alone would give the plaintiff a right to recover if he was without fault"] "inconsistent with the principle which we have already stated. That decision related to the liability of the defendant. It may be, where a penal statute does not purport to create a civil liability, or

[61] Bostock-Ferari Co. *v.* Brocksmith, 34 Ind. App. 566, Smith's Cases on Torts 2 ed., 553. *Cf.* Gregory *v.* Adams, 14 Gray (Mass.) 242.

[62] Richards *v.* Waltz, 153 Mich. 416, involves a similar point. The defendant violated a statute requiring him to maintain certain specified danger signals and barricades when cutting ice, and this caused the death by drowning of the plaintiff's cow. The barricades required were of a kind which would afford little protection to any animals, and none at all to small animals, and the majority of the court denied the plaintiff a recovery on the ground that the statute was intended to protect human beings only. It is on similar grounds that such cases as Menut *v.* Boston & Maine, 207 Mass. 12, denying a recovery to human beings injured by a railroad's failure to fence its line, must be supported, where, as is ordinarily the case, the corporation which had the duty of fencing was running the train which caused the injury. If they were not the same person, different principles would be involved.

If these views are sound, Osborne *v.* Van Dyke, 113 Ia. 557, holding the defendant liable without evidence of negligence because he was cruelly beating a horse, seems hard to support. See also Bohlen's Cases on Torts, notes 178–179.

to protect the rights of particular persons, that a violation of it will not subject the violator to an action for damages, unless his act, when viewed in connection with all the attendant circumstances appears to be negligent or wrongful. And at the same time courts may well hold that, in the sanctuary of the law, a violator of law imploring relief from the consequences of his own transgression will receive no favor."

Such a distinction, treating a plaintiff with greater severity than a defendant in respect of the same conduct, may find some support both in reason and in legal analogy. For disciplinary purposes, from considerations of decency and propriety, and out of regard for its dignity, a court may refuse to listen to a suitor who has been guilty of some sorts of misconduct, regardless of the merits of his complaint as between him and the defendant. The immunity which the latter receives from the just consequences of his misconduct is deemed a lesser evil than the administration of justice by the state for the benefit of evildoers. The defense of illegality in actions of contract makes these principles familiar. But their application to such cases as the present is a very different matter.

It must be observed in the first place that the plaintiff's action is not barred by the mere circumstance that he was breaking the law when injured. Here, as in the case of a defendant, the violation of law is immaterial unless it had some causal connection with the injury. This was ably set forth in Chief Justice Dixon's well-known opinion in Sutton *v.* Wauwatosa,[63] allowing a recovery in a highway case to a traveler who was violating the Sunday law; and the reasoning of this opinion has now been approved even by the court whose decisions it chiefly criticized.[64] This principle,

[63] 29 Wis. 21, Smith's Cases on Torts, 2 ed., 115.

[64] See the opinion of Knowlton, C. J., in Bourne *v.* Whitman, 209 Mass. 155. Peculiarities in the earlier Massachusetts cases have somewhat embarrassed the court in its recent careful treatment of the subject in such cases as Bourne *v.* Whitman, 209 Mass. 155, and Berdos *v.* Tremont & Suffolk Mills, 209 Mass. 489. But as Judge Smith has pointed out (Cases on Torts, 2 ed., 122, note), the result in the Massachusetts Sunday cases, much as their reasoning has been criticized, may well be supported on the ground put forward by Ross, J., in Johnson *v.* Irasburgh, 47 Vt. 28, that the plaintiff was not entitled to the rights of a traveler. The same reasoning may perhaps justify such decisions as Holden *v.* McGillicuddy, 215 Mass. 563, denying a recovery to the occupant of an unlicensed automobile; but see the cases to the contrary cited in 27 HARV. L. REV. 93. As to the Sunday cases see also "The Plaintiff's Illegal Act as a Defense in Actions of Tort," 18 HARV. L. REV. 505, by Harold S. Davis.

that the plaintiff's criminality does not of itself bar his suit without reference to its operation in the particular case, goes far to answer the suggestion that a plaintiff should be treated more severely than a defendant; for once the court is prepared to hear the plaintiff at all and to treat his case as one fit for its consideration in spite of his wrongdoing, it must not be forgotten that the fundamental question is whether an admitted loss shall be borne by the plaintiff or shifted to the defendant. If the defendant is held liable because his unlawful conduct caused the harm, this means that the law deems it just as between the parties that he rather than the plaintiff should suffer the loss. If so, he should suffer it none the less when the parties are reversed and he appears as plaintiff. If, on the other hand, such conduct does not of itself render the defendant liable, but is only "evidence of negligence," and other elements must be made to appear before he can justly be called on to bear the loss, the plaintiff should as between the parties be entitled to a consideration of the same elements before the issue is decided against him.[65] And the short answer to Chief Justice Knowlton's suggested distinction in Newcomb *v.* Boston Protective Department is that the difficulty with which he was dealing existed only for a court which was bound by Hanlon *v.* South Boston Railroad,[66] and that his powerful reasoning in the Newcomb case and in Bourne *v.* Whitman[67] demonstrates the unsoundness of the Hanlon case as an original question.[68]

Another situation in which it is possible to treat a plaintiff and

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[65] The parallel situation of the parties is well brought by Hamersley, J., in Monroe *v.* Hartford St. Ry. Co., 76 Conn. 201, where the plaintiff had violated an ordinance against leaving horses unhitched.

[66] The Hanlon case contrasts oddly with Salisbury *v.* Herchenroder, 106 Mass. 458.

[67] 209 Mass. 155.

[68] In differentiating plaintiffs and defendants the courts may have been unconsciously influenced by practical considerations. In the sort of case that commonly presents itself a jury will be quick enough to find against a defendant whose illegal conduct has caused the injury. The plaintiff therefore has accomplished all that he needs as a practical matter if he is allowed to introduce the breach of law as "evidence of negligence," and the court is not driven to any closer analysis. But when the plaintiff's conduct is in question the harshness of contributory negligence as a defense and the relative situation of the parties often make the jury grasp at any opportunity to exonerate the plaintiff of negligence even though he broke the law. Justice to the defendant thus requires that the lines be exactly drawn, and the duty to give him proper protection — protection which in the converse case the plaintiff does not need — forces the court to examine the principles more closely.

a defendant differently arises when the plaintiff's violation of law has caused harm of a kind not aimed at by the statute. Chief Justice Knowlton's suggested discrimination against the plaintiff might be applied here, and contributory illegality might be held to bar a plaintiff's action even though the same conduct with the same consequences would not have rendered him liable as a defendant. In the language, at least, of the cases,[69] there is some warrant for such a distinction; for the statement that illegal conduct will bar a plaintiff if it contributed to his injury is constantly made in a broad way, without the qualification about the purpose of the statute which is so familiar when the wrongdoer is sued as defendant. But such language is rarely necessary to the decision, and the distinction does not commend itself as a matter of reason. Since the plaintiff is not barred by the mere fact of his wrongdoing but only by its effect in causing the injury, it must be a question of its relation to the controversy between these parties; and the same considerations which entitle the defendant to assert the immateriality of this conduct when urged against him as a ground of liability apply no less strongly in favor of the plaintiff. The plaintiff has committed an offense against the state, which the state may punish; but what is this to the defendant? No consequences of the sort which occurred were feared or foreseen by the legislature, or would have been by the prudent man; until the statute was passed the plaintiff's conduct was blameless; and so far as concerns this defendant and these consequences it is no more blameworthy now. There are, no doubt, considerations which may be urged against this view; but in so far as these have weight, they go to show that the wrongdoer should be held liable when sued as a defendant, and not that a discrimination should be made against him when he appears as a plaintiff.

The unfitness of such a discrimination is apparent when the character of contributory negligence as a defense is considered — a defense so severe that it permits no apportionment of loss, but cuts off all redress for harm caused by a defendant's negligence even though the plaintiff's lack of care threatened harm to no one but himself, and was relatively a minor factor in causing the harm. The reinforcement brought to this stringent defense by the suggested dis-

[69] See 27 HARV. L. REV. 94.

crimination against the plaintiff would come oddly at a time when the defense itself is crumbling at many points under attacks both legislative and judicial.

4. The governing principle in this whole matter — the court's duty to accept ungrudgingly the declared will of the legislature and to recognize its full logical effect in modifying the common law — has a bearing on that "part of the law still in the nebulous but clearing stage," as Hammond, J., has put it,[70] which concerns interferences with business by strikes and trade combinations. In such cases the court is constantly called on to determine the legitimate scope of business activity. Harm has been done intentionally, and the question is one of justification, — has the defendant kept within the rules of civic warfare?

These questions, as Sir Frederick Pollock has said,[71] "involve subtle considerations of a psychological kind which our ancestors thought beyond the competence of courts, or at all events of juries, and did not attempt to bring within the sphere of litigation; and in dealing with such considerations a wide field is left open to divergent views of economic and social policy." But modern legislation has much narrowed that field. The courts cannot forget that within the limits of the constitution the legislature has the absolute right to impose its economic views on the community. However unsound those views may seem, or may be, the court has only to accept and apply them. Such an acceptance may call for much self-restraint and breadth of view, and may lead to the modification of much that has been decided. If, for example, the common law's hostility toward combinations of workmen has reflected itself in decisions in which monopolizing policies of laborers are looked at with greater severity than like combinations among traders, modern legislation fairly construed may require exactly the opposite treatment. In the field of business combinations legislatures are declaring their views with freedom, and condemning many things. In each instance the condemnation means that the thing is declared a public danger — in other words, a nuisance *quoad* the evil which was feared. Doing such a thing is no longer legitimate business activity, and harm intentionally

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[70] L. D. Wilcutt & Sons Co. *v.* Driscoll, 200 Mass. 110, 116.

[71] Pollock, Torts, 8 ed., 333.

inflicted by means of such conduct will be actionable, for the defendant's justification will fail. The rules of the fight have been changed by the final authority, and the field of competition has been cut down accordingly. In dealing with these cases the courts have no duty more important than a careful study of the whole statute law on the subject in order to extract from it the declared legislative policy. And whether that policy be enlightened or the reverse, its free acceptance will best preserve the dignity and power of the court.

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